Nos. 79-1975, 79-2001, 79-2067
80-99, 80-115 and 80-129

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL,

Petitioners

vs.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

RESPONDENT BUCKLEY'S BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The respondents Buckley respectfully request this Court to deny the petitions for writ of certiorari that seek review of the Seventh Circuit's opinion, dated April 29, 1980, (Perry Township Joint Appendix, hereafter JA, page 1, as yet unreported). Resondents also request that the cross petition for writ of certiorari filed by IPS be denied.

QUESTIONS PRESENTED FOR REVIEW

Only two (2) questions are raised by the opinions below and the record in this case:

1. Did the District Court and the Seventh Circuit clearly err in finding that the 1969 legislative freeze of IPS boundaries and the site selection practices of HACI were based, at least in part, on a racially discriminatory intent?

2. Did the District Court abuse its discretionary power to frame a systemwide desegregation remedy when it ordered IPS to formulate an intradistrict plan and to transfer black students to various added defendant school districts but did not require the transfer of any white students from those districts into IPS?

STATEMENT OF THE CASE

The first lengthly trial resulted in a judgment by the District Court that IPS was unlawfully segregated and that additional defendants should be joined so the Court could explore an interdistrict remedy. *United States v. Board of School Commissioners*, etc., 332 F. Supp. 655 (S.D. Ind. 1971) (See IPS Appendix, 1a). This Court denied certiorari, 413 U.S. 920 (1973).

The second trial, in June and July, 1973, resulted in a judgment by the District Court that the State of Indiana had by various acts and omissions promoted segregation

and inhibited desegregation within Indianapolis. Thus the state, as the agency ultimately charged under Indiana law with the operation of the public schools, had a continuing duty to desegregate the Indianapolis system. 368 F. Supp. 1191 (S.D. Ind. 1973) (IPS Appendix, 11a). Before the Seventh Circuit ruled on appeals from that judgment, this Court decided *Milliken v. Bradley*, 418 U.S. 717 (1974). Relying on *Milliken v. Bradley*, the Seventh Circuit thereafter dismissed the action as to defendants beyond the limits of Marion County (Uni-Gov). However, it affirmed that the state had a duty to assist in desegregation and it remanded the case for the District Court to determine "whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy in accordance with *Milliken*." 503 F.2d at 862.

After the third trial, in March of 1975, the District Court amplified its earlier findings on the State's promotion of segregation and inhibition of desegregation. It found that the location of housing projects by instrumentalities of the State of Indiana (HACI and the Metropolitan Development Commission) tended to cause and to perpetuate the segregation of black pupils in IPS territory and to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools. 419 F. Supp. 180, 183 (S.D. Ind. 1975) (Lawrence, Warren and Wayne Supplemental Appendix, A40). The Court further found that in view of all of the facts and circumstances set out in its opinion and in its former opinions, the establishment of IPS boundaries, inhibited desegregation and warranted a limited interdistrict remedy. 419 F. Supp. 180, 183 (S.D. Ind. 1975) (Lawrence, Warren and Wayne Supplemental Appendix A40).

The Seventh Circuit affirmed on July 16, 1976, 541 F.2d 1211 (1976). Thereafter this Court decided *Village of*

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Then, on January 25, 1977, this Court, at 429 U.S. 1068, summarily vacated the judgment and remanded it to the Court of Appeals for further consideration in light of *Arlighton Heights* and *Washington v. Davis*, 426 U.S. 229 (1976).

The "further consideration" mandated by this Court has been given. The Seventh Circuit, after reviewing the issues, concluded that all predicates for an interdistrict remedy under *Milliken v. Bradley* were present except that the Court could not reach a decision on discriminatory intent "as a matter of law". Therefore, the Seventh Circuit remanded the case to the District Court for further findings on the issue of discriminatory intent, i.e., "whether the relevant acts or omissions of state or local officials were motivated, at least in part, by a racially discriminatory purpose or intent as articulated in *Washington v. Davis* and *Arlington Heights.*" 573 F.2d 400, 404 (1978). The Seventh Circuit added that "(T)he task of the District Court is to make further findings of fact from evidence already in the record or, if necessary, as supplemented by additional evidence." Id. at 404 (JA 58).

The District Court responded to the remand in its decision of July 11, 1978, 456 F. Supp. 183 (S.D. 1978) (JA 84). The Court began its opinion with a recital of the general tests and the evidentiary considerations listed by this Court in *Arlighton Heights* (JA 87). Then, as pointed out by the Seventh Circuit when it affirmed the District Court's findings:

> "The district judge considered the timing of the decision [with respect to Uni-Gov and IPS boundaries], the history of state sanctioned discrimination against black students within IPS, the foreseeable impact of the decision on the minority population of Indianapolis, and the predominantly political, rather than educational, reasons for the decision and concluded

that it was made with a discriminatory purpose." (JA 11).

Continuing, the Seventh Circuit held that:

"We do not think any of those factors was improperly considered under Washington v. Davis or Arlington Heights, nor do we believe that the conclusion of discriminatory purpose was clearly erroneous in light of evidence of record." (JA 11).

With respect to housing violations, the District Court found as follows:

"The action of...official bodies in locating such projects within IPS, as well as the opposition of suburban governments to the location of public housing within their borders, was racially motivated with the invidious purpose to keep blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only." 456 F. Supp. 183, 189 (JA 93-4).

The Seventh Circuit, affirming, said that:

"These findings were based on the history of racial discrimination, both public and private, in housing in Marion County; on the natural and foreseeable results of the site selection practices; on the absence of convincing non-racial justifications for HACI's failure to locate projects outside of IPS; and on other actions by the Commission, not directly related to housing, which led the court to conclude that 'the separation of the races, both in bousing and in schools, has been an unspoken, but intentional, policy of the commission.' 456 F. Supp. 189."

"The district court's findings have ample support in the record." (JA 14-15).

With respect to the transfer plan adopted by the District Court, the Seventh Circuit, in affirming, explained as follows:

"Under this plan black students from IPS are to be transferred from IPS to other districts in the city but no students from other districts are to be transferred to IPS. Many white students within IPS will be reassigned to other schools within the district, however, so that it cannot be said that only minority students will bear the burden of the remedy imposed by the court. The court also considered the generally better facilities available in the outer districts as compared to IPS and the fact that reducing the student population of IPS would allow that district to close some obsolete schools. Therefore, despite our concerns about the possible inequities of the plan, we are not prepared to say that it was such an abuse of discretion that it must be set aside in favor of a two-way plan." (JA 23).

REASONS WHY THE WRIT SHOULD BE DENIED

I

The courts below, on remand, gave full consideration to the issue of discriminatory intent as this court had ordered, did not decide in a way that conflicts with any other circuit or with applicable decisions of this court, and decided correctly.

Even a cursory examination of the District Court's opinion (JA 84) and that of the Court of Appeals (JA 1) will reveal beyond question that both courts attempted conscientiously to carry out this Court's mandate to review the case in light of *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis* 426 U.S. 299 (1976). Further review by this Court would involve nothing more than determining whether the courts below were clearly erroneous in finding from evidence of many circumstances that certain State actions, affecting the school population in

IPS and Marion County, were taken, at least in part, with a discriminatory intent.

A careful reading of the Seventh Circuit's opinion (JA 1) will reveal that not one of the questions stated in the petitions for certiorari to be presented by this case was actually decided either by the District Court or by the Court of Appeals as the basis for a finding or for the judgment. In truth, the only questions squarely presented by the record are two highly particularized questions, i.e, (1) whether the District Court's findings of fact were clearly erroneous and (2) whether the District Court abused its discretion in formulating any portions of the interdistrict remedy. This Court ordinarily does not grant certiorari simply to review evidence and discuss specific facts, *U.S. v. Johnston*, 268 U.S. 220, 227 (1924). Concurrent findings of fact by the courts below are usually not reviewed by this Court. *Grover Mfg. Co. v. Linde Co.*, 336 U.S. 291, 275 (1948). Mr. Justic Stewart, with whom the Chief Justice joined in *Columbus Board of Education v. Penick*, wisely observed that:

> "In assessing the facts in lawsuits like these [i.e., school desegregation cases], I think appellate courts should accept even more readily than in most cases the factual findings of the courts of first instance." 99 S. Ct. 2941 (1979).

In reaching his findings of fact, the trial judge, formerly an Indiana legislator, drew on his familiarity with Indianapolis and its schools. As Mr. Justice Powell said in his dissenting memo in *Estes v. Metropolitan Branch of Dallas NAACP*, 100 S. Ct. 716 (1980), there is need for deference to this "delicate task", whether that task be formulating a remedy, as in *Estes*, or determining whether there has been discriminatory intent.

The value of first-hand knowledge of the record is apparent in this case because of the complex content provided by decades of state fostered and approved racial

segregation not only in schools but, also, in all walks of life. That context was well understood by the district judge who was familiar with the testimony, the legislature, the geographic area, its people, and the work of State agencies and officials. The record abounds with contextual and historical evidence. See the District Court's opinion at JA 88-90, and its earlier opinions (IPS Appendix 1a, and 11a). From the evidence summarized in the Court's findings, it is clear that the State of Indiana, through its General Assembly, officials, and agencies intentionally created, fostered, and helped maintain segregation within IPS and between IPS and adjacent school districts. It did this, among other ways, by confining blacks to an "artificial unrepresentative community" (IPS Appendix 32) near the center of Indianapolis, and by discouraging blacks from expanding throughout Indianapolis and into adjacent school districts (JA 88-90).

The confinement of blacks to particular schools was declared no longer to be state policy by 1949 Indiana legislation, IC 20-8.1-2-1, et seq. However, the actions of state and local officials continued as under previous segregation laws. See 456 F. Supp. 183, 188-190 (JA 88-90). The record indicates that as to Marion County, at least, the State's segregative polices never changed. Said the District Court:

> "From the foregoing, it will be noted that Indiana, unlike most states in the north and west, practiced *de jure* segregation by act of the General Assembly, just as was true in the southern and border states. Brown v. Board of Education, 347 U.S. 483 (1954), therefore imposed upon Indiana and upon Indiana communities such as Indianapolis, which had practiced segregation in its schools, an instant duty to desegregate.
>
> "However, the law of this case is that successive School Boards of the City of Indianapolis after Brown continued polices of *de jure* segregation in the

operation of IPS up until the time of this court's first decision in 1971, aided and abetted by officials of the State of Indiana." (JA 89-90).

The aiding and abetting by the state in school desegregation and in discriminatory public housing practices both fostered and continued the separation of the races in Marion County between IPS and the other school districts. The District Court detailed this process by detailing the sequence of events leading up to the Uni-Gov legislation, the departures from normal legislative history, and the housing violations (JA 90-96). It thus seems apparent that the District Court and the Court of Appeals not only avoided clear error but also decided the case correctly.

II

The interdistrict pupil transfers ordered by the District Court effectively remedy the constitutional violation.

The interdistrict portion of the remedy formulated by the District Court preserves the independence of local school systems, is not disruptive, and does not intrude into local political processes (JA 104-120).

The District Court made clear in all of its reasoning directed to a remedy that it was trying to create a limited remedy and to avoid resegregation (August 1, 1975, IPA Appendix 42-44; July 11, 1978, JA 104-120). The District Court was not trying to create a racial balance in every school that would equal the ratio of blacks and whites in IPS or in Marion County (July 20, 1973, IPS Appendix, 18-19). Instead, the Court, following *Green v. County School Board*, 391 U.S. 430 (1968), attempted to come forward with a limited interdistrict plan that remedied the violation and promised realistically to work (August 18, 1971; IPS Appendix 16).

Unlike the plans approved by the Courts of Appeals in other recent school desegregation cases that have come before this Court, the interdistrict portion of the District Court plan did not abolish school districts, (see *Delaware v. Evans*, cert. denied 100 S. Ct. 1862), did not give only passing notice to the question of remedy (see *Cleveland Board of Education v. Reed*, 100 S. Ct., 1329), and was clearly concerned with the problem of resegregation (see *Estes v. Metropolitan Branches of Dallas NAACP*, 100 S. Ct. 716). Rather, the District Court anticipated the concerns recently expressed by members of this Court in dissents to the denial of certiorari or to a dismissal of certiorari as improvidentally granted. It seems clear, therefore, from the record and the findings in this case, that there is even less reason to grant certiorari than in any of above cited cases where certiorari was denied (or initially granted but later dismissed).

The IPS cross petition characterizes the District Court's remedy as "one-way" bussing. The remedy is most emphatically not a one-way remedy. Many white students within IPS have already been reassigned and additional white students will be reassigned to other schools within IPS, as part of the combined intradistrict and interdistrict plan that ultimately will be adopted for Marion County. The District Court's degree shows not only a logical relationship to the nature and scope of the constitutional violation but also a sensitive awareness to the many circumstances that exist in multi school district areas, such as Marion County. The interdistrict transfers ordered by the Court take account of the fact that in the outer districts there generally are better facilities and there currently are unused facilities in those districts. Also, reducing the school population of IPS allows IPS to close some obsolete schools.

It would be extremely difficult for this Court, on the basis of a printed record, to decide with any degree of confidence

that the *only* appropriate plan would have to include two-way interdistrict transportation between IPS and the added defendant school systems. As the Seventh Circuit said in affirming the District Court's remedial order,

> "Many white students within IPS will be reassigned to other schools within the district, however, so that it cannot be said that only minority students will bear the burden of the remedy imposed by the court." (A 23). [Emphasis added.]

We submit that the District Court's remedy is well within the guidelines of Milliken v. Bradley, 433 U.S. 267, 280 (1977) (that the court should consider the nature and scope of the constitutional violations), is within *Davis v. School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971) which called for an effective remedy), and is within the guidelines provided by *Swann v. Charlotte-Mechlenburg Board of Education*, 402 U.S. 1 (1970) (that the District Court should be realistic). The District Court's discretion was thus not abused and, indeed, was wisely exercised.

CONCLUSION

The Court of Appeals was correct in concluding that the decision of the District Court was *not* clearly erroneous. Also, the Court of Appeals did not err in concluding that the remedy invoked by the District Court was adequate to eliminate the constitutional violation and did not constitute an abuse of discretion. For the above reasons, the petitions for a writ of certiorari should be denied and the cross petition for a writ of certiorari should be denied.

Respectfully submitted,

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